IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1933.

No. 54

ACEL C. ALEXANDER, COLLECTOR OF INTERNAL REVENUE, *Petitioner,*

vs.

COSDEN PIPE LINE COMPANY, *Respondent.*

On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

PETITION *for* REHEARING.

Comes now the above named respondent, Cosden Pipe Line Company, and presents this, its petition for a rehearing of the above entitled cause, and in support thereof respectfully shows:

This court erred in refusing to award respondent any relief with respect to illegal taxes which it was required to pay in connection with the third class of oil involved herein.

This petition for rehearing is directed solely to the conclusion of this court with reference to the third class of oil involved herein.

In this case the respondent, as is disclosed by the opinion of this court, asserted four distinct claims, the *first* related to 2,022,284.41 barrels of oil, the *second* to 20,644,020.34 barrels of oil, the *third* to 3,666,048.39 barrels of oil, and the *fourth* to 99,590.31 barrels of oil. As to each of said four classes of oil respondent was required to pay transportation taxes assessed upon the basis of 20c per barrel and sued to recover such parts of said taxes as it claimed were excessive. And although this court clearly and unequivocally holds that all of the taxes which respondent was required to pay, with respect to each of said classes of oil, in excess of those produced upon the said basis of 12½c were erroneous and illegal, it refused to grant respondent any relief with reference to the third class of said oil. Two reasons are given therefor, to wit: *(1)* That respondent acquiesced in and complied with the erroneous requirement of the Circuit Court of Appeals to the effect that it remit a portion of the judgment awarded to it by the District Court with respect to said third class of oil; and, *(2)* that, although respondent in its brief herein urged that the remittitur requirements of the Circuit Court of Appeals were erroneous and that in no event was it liable for taxes in connection with said third class of oil upon any basis in excess of 12½c, it did not file a cross petition for review by this court. (See respondent's brief, pages 58, 65.)

Unquestionably there is no reason or equity, under the record herein, for requiring respondent to pay taxes with respect to the above third class of oil upon any basis in excess of 12½c per barrel. And if said basis of 12½c were applied to said third class of oil respondent would be entitled to judgment in connection therewith for $13,749.93.

This court in the case of *Langnes* v. *Green*, 282 U. S. 531, 538, and in the cases cited therein, holds that when a case is brought to this court by *certiorari* from the Circuit Court of Appeals it is not limited to a consideration of the points raised by the plaintiff, and has the power to enter the judgment which should have been rendered by the court below on the record then before it. Therefore, it is quite inconceivable to us that this court, actuated as it is with the establishment of justice and equity, would refuse to give to respondent the relief which the record and opinion herein clearly and unequivocally disclose it was entitled to. If there ever were a case justifying the exercise of the power which this court in the *Langnes* case, and the cases cited therein, held that it has, it is the case at bar. In substance and effect, the opinion of the court herein says to respondent—a taxpayer—that the Circuit Court of Appeals erroneously required you to remit $13,749.93 with reference to the third class of oil involved herein, however, we will not relieve you therefrom, but we will grant the Government—the tax collector—relief from such errors as the Circuit Court of Appeals committed against it.

It seems to us that to grant the petitioner the relief which this court concludes it was entitled to, while denying to the respondent the relief to which it in justice and equity was entitled, is manifestly incongruous. Certainly it is difficult, if not impossible, to understand how a court can justify awarding the Government relief against a taxpayer and at the same time permit it to hold on to what it has erroneously received from the same taxpayer. In short, it seems to us that if this court concludes that the Government is entitled to any relief it should be required as a

condition to the award of such relief, to refund that which this court concludes it was not entitled to receive. In this way, and in only this way, can full and complete justice be done to each of the parties, the petitioner as well as the respondent.

The opinion of the Circuit Court of Appeals herein reversed and remanded the case at bar for a new trial unless within twenty-five days from the filing of said opinion the respondent filed a remittitur of $18,333.25 of its judgment with respect to the third class of oil involved herein. That opinion was filed on the 9th of February, 1933 (R. 128). Thereafter, the respondent, rather than re-try the case or file a petition for writ of *certiorari* in this court, filed said remittitur, whereupon, on the 23rd day of February, 1933, the Circuit Court of Appeals entered its final judgment affirming the judgment of the trial court as modified and reduced (R. 135). Thereafter, on the 9th day of May, 1933, just three months after the judgment of the Circuit Court of Appeals was entered, the petitioner filed in this court his petition for writ of *certiorari*. And, regardless of the fact that the rules of this court required the petitioner to notify counsel for respondent of the filing of his petition for writ of *certiorari* within ten days after the same was filed, the Solicitor General did not, until the 19th day of May, 1933, deposit in the United States mails at Washington, D. C., notice to counsel for respondent of the filing of said petition, which said notice was received by respondent and service thereof acknowledged on the 21st day of May, 1933. Prior to receipt of this notice respondent had no notice or knowledge that petitioner intended to appeal to this court. It was, therefore, impossible for the respond-

ent to file herein a cross petition for writ of *certiorari* within the time allowed by law (39 Stat. 727). However, respondent did in its brief herein, as well as upon the oral argument before this court, insist that the Circuit Court of Appeals erred in requiring the aforesaid remittitur.

In the *Langnes* case, *supra*, this court, speaking through Mr. Justice SUTHERLAND, said:

> "The question then arises: What is the scope of inquiry in this court when the case is brought up by *certiorari* from the Circuit Court of Appeals? It has been decided that upon writ of error from an intermediate appellate tribunal we are not limited to a consideration of the points raised *by the plaintiff*, but '*must enter the judgment, which should have been rendered by the court below on the record then before it.*' *Baker* v. *Warner*, 231 U. S. 588, 593, 57 L. ed. 384, 388, 34 S. Ct. 175. And in *Delk* v. *St. Louis & S. F. R. Co.*, 220 U. S. 580, 588, 55 L. ed. 590, 595, 31 S. Ct. 617, following *Lutcher & M. Lumber Co.* v. *Knight*, 217 U. S. 257, 267, 54 L. ed. 757, 761, 30 S. Ct. 505, it was held that *on certiorari, likewise, the entire record is before this court with power to review the action of the Court of Appeals and direct such disposition of the case as that court might have done upon the writ of error sued out for the review of the Circuit* (now District) *Court*. In *Watts, W. & Co.* v. *Unione Austriaca Di Navigazione*, 248 U. S. 9, 21, 63 L. ed. 109, 101, 3 A. L. R. 323, 39 S. St. 1, it was said that 'this court, in the exercise of its appellate jurisdiction, has power not only to correct error in the judgment entered below, but to make *such disposition of the case as justice may at this time require*'; and 'the rule is the more insistent, because, in admiralty, cases are tried *de novo* on appeal.' See, also, *Dorchy* v. *Kansas*, 264 U. S. 286, 289, 68 L. ed. 686, 689, 44 S. Ct. 323." (Italics ours.)

For the foregoing reasons, we respectfully urge that this petition for a rehearing be granted, and that the judgment of this court be modified so as to require petitioner to repay to respondent all taxes in connection with the third class of oil involved herein in excess of those produced upon the basis of 12½c, the basis upon which this court, in its opinion herein, concludes respondent was liable for transportation taxes under both the 1917 and the 1918 Revenue Acts.

Respectfully submitted,

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CERTIFICATE OF COUNSEL.

I, Richard H. Wills, of counsel for the above named respondent, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

RICHARD H. WILLS.